

A **DATO' HAMZAH ABDUL MAJID v. OMEGA SECURITIES
SDN BHD**

FEDERAL COURT, PUTRAJAYA

AHMAD MAAROP FCJ

JEFFREY TAN FCJ

B ABU SAMAH NORDIN FCJ

ZAHARAH IBRAHIM FCJ

[CIVIL NO APPEAL: 02-68-09-2014]

4 NOVEMBER 2015

C **SECURITIES:** Shares – Trading account – Margin trading facility – Claim for contra losses on transactions – Unpleaded defence – Defence that facility was a loan transaction raised during cross-examination – Whether a radical departure from pleaded case – Whether mere variation, modification or development – Whether trial judge rightly rejected defence of loan – Whether principle in *Superintendent of Lands and Surveys (4th Div) & Anor v. Hamit bin Matusin & Ors* applicable

D **CIVIL PROCEDURE:** Appeal – Appeal to Federal Court – Questions of law – Claim for contra losses on share transactions – Unpleaded defence that facility was a loan transaction raised during cross-examination – Whether elements of loan existed – Whether defence of loan a radical departure from pleaded case – Whether court could reject evidence thereof on account that it was not pleaded – Whether principle in *Superintendent of Lands and Surveys (4th Div) & Anor v. Hamit bin Matusin & Ors* applicable

F The respondent, a stock broking firm, issued an offer to the appellant to open a share trading account. The appellant accepted the offer and executed, amongst others, an undated Margin Facility Agreement ('MFA'). Thereafter, the respondent granted a Margin Trading Facility ('MTF') of up to a limit of RM10 million. The respondent subsequently claimed from the appellant the sum of RM12,658,779, being alleged contra losses on the share transactions and interest thereon in the sum of RM5,997,788.53. In his statement of defence, the appellant denied that he had executed the said MFA, or that he was granted the said MTF, or that he had traded in share transactions under the said Margin Account. Alternatively, the appellant contended that he had instructed the respondent to dispose of 15,939,000 shares in Wembley Industries Holding which he had pledged to the respondent, which, if so disposed, the appellant said, would have been sufficient to cover any alleged debt. The facts further showed that, at the trial, an unpleaded defence was raised by the appellant during the cross-examination of PW1. The appellant contended, by way of the cross-examination, that he had applied to the respondent for a loan of RM7-8 million, that he had deposited some 15.9 million Wembley shares with the respondent, that a sum of RM8m was deposited into the account of Cempaka Holdings Sdn Bhd ('Cempaka') in which he was a director, and that the respondent had been instructed to sell those shares to settle the loan and

refund any surplus to him. The respondent had indicated its objection to the unpleaded defence, but, with the concurrence of the appellant and the trial judge, had agreed to raise the objection at the stage of submissions at the close of the entire case. The trial judge, having admitted the evidence pertaining to the 'loan', rejected the same on grounds that it was an afterthought, and in the circumstances, gave judgment for the respondent. On appeal, the Court of Appeal affirmed the decision of the trial judge. The appellant had applied for, and, having been granted leave to appeal, posed the following questions of law to the Federal Court, namely: (i) whether as a matter of law, the elements of a loan existed where at the request of a person, payment of money was made by the payer to a third party; and (ii) whether a court, having regard to the principle established by the decision in *Superintendent of Lands and Surveys (4th Div) & Anor v. Hamit Matusin & Ors* ('*Superintendent's case*'), and having admitted evidence on an unpleaded point, was entitled to reject that evidence by reference to the fact that it was not pleaded.

Held (dismissing appeal with costs; declining to answer questions posed)
Per Jeffrey Tan FCJ delivering the judgment of the court:

- (1) The trial judge had plainly applied Superintendent's case and admitted the evidence of the 'loan', but held that it was an afterthought which was not proved on a balance of probabilities. It was absolutely untrue that evidence of 'loan' was rejected by the trial judge on the ground that it was not pleaded. 'Loan' was rejected by reference to the fact that it was not credible. Leave question no. 2 was premised on a misconception of the findings of the trial judge. Since the factual gravamen was absent, it would be wholly idle to answer leave question no. 2. (paras 11 & 16)
- (2) Evidence of 'loan' was only adduced when the appellant tendered and read his witness statement at the hearing. The earliest opportunity for the respondent to object was at the stage of cross-examination of the appellant. However, even before evidence of 'loan' could be adduced, it was agreed between the parties, with the concurrence of the trial judge, that the issue of the unpleaded defence would be raised at the stage of submissions at the close of the entire case. Given so, it was not right to fault the respondent for raising the objection only at that stage. (paras 13 & 14)
- (3) The instant facts were so different from that of *Superintendent's case*, and it was not suitable to apply the principle of that case where "the alleged defences were not a radical departure from what had been pleaded and was a mere development of it". On the facts herein, 'loan' was not a variation, modification or development but a radical departure from the pleaded case. Any radical departure from the pleaded case must be pleaded to avoid surprise at the trial. Therefore, 'loan', which was not pleaded and which was a radical departure from the pleaded defence,

- A should not have been allowed to be proved at the trial. It was not proper to apply *Superintendent's* case just because the evidence was adduced without objection. (paras 13 & 15)
- (4) The facts were also not there for leave question no. 1 to be posed. There was no finding by the courts below that it was the respondent who had deposited RM8 million into the account of Cempaka by way of a loan.
- B On the other hand, it was the finding of the trial judge that it was a margin trading. The trial judge gave umpteen reasons for the findings, which were based on solid evidence, and they should not be lightly disturbed by an appellate court. 'Loan' was clearly an afterthought.
- C Given that, leave question no. 1 could also not be answered. (para 17)

Bahasa Malaysia Translation Of Headnotes

- Responden, sebuah firma broker saham, telah mengeluarkan tawaran kepada perayu untuk membuka satu akaun pemerdagangan saham. Perayu telah menerima tawaran tersebut dan telah, antara lain, memeterai satu perjanjian kemudahan tanpa margin yang tidak bertarikh ('MFA'). Selepas itu, responden telah diberikan kemudahan margin saham perdagangan ('MTF') sehingga had RM10 juta. Responden kemudian menuntut daripada perayu sejumlah RM12,658,779, iaitu kerugian kontra ke atas urusan niaga saham dan faedah ke atasnya yang berjumlah RM5,997,788.53. Dalam pernyataan pembelaannya, perayu menafikan bahawa dia telah memeterai MFA tersebut, atau bahawa dia telah diberikan MTF tersebut, atau bahawa dia telah berdagang dalam urusan niaga saham di bawah akaun saham margin tersebut. Sebagai alternatif, perayu menghujahkan bahawa dia telah mengarahkan responden untuk melupuskan 15,939,000 saham di Wembley Industries Holding yang dijanjikan kepada responden, yang, jika dilupuskan, dikatakan oleh perayu, akan mencukupi untuk membayar sebarang hutang. Fakta-fakta selanjutnya menunjukkan bahawa, semasa perbicaraan, satu pembelaan yang tidak diplidkan telah dibangkitkan oleh perayu semasa pemeriksaan balas PW1. Perayu menghujahkan, melalui pemeriksaan balas, bahawa dia telah memohon kepada responden untuk pinjaman sebanyak RM7-8 juta, bahawa dia telah menyimpan sebanyak 15.9 juta saham Wembley dengan responden, bahawa sejumlah RM8 juta telah didepositkan ke dalam akaun Cempaka Holdings Sdn Bhd ('Cempaka') di mana dia adalah seorang pengarah dan bahawa responden telah diarahkan untuk menjual saham tersebut untuk menyelesaikan pinjaman dan membayar balik apa-apa lebih kepada mereka. Responden telah menyatakan bantahannya terhadap pembelaan yang tidak diplidkan, tetapi, dengan persetujuan perayu dan hakim bicara, telah bersetuju untuk membangkitkan bantahan di peringkat penghujahan pada penutupan keseluruhan kes. Hakim bicara, dengan menerima keterangan berkaitan dengan 'pinjaman', telah menolak keterangan tersebut atas alasan bahawa ia adalah fikiran terkemudian, dan dalam keadaan tersebut memberikan penghakiman yang berpihak kepada responden. Atas rayuan, Mahkamah Rayuan telah mengesahkan keputusan
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hakim bicara. Perayu telah memohon untuk, dan, setelah diberi kebenaran untuk merayu, menimbulkan persoalan undang-undang berikut kepada Mahkamah Persekutuan, iaitu: (i) sama ada dari segi undang-undang, unsur-unsur pinjaman wujud di mana atas permintaan seorang, bayaran wang telah dibuat oleh pembayar kepada pihak ketiga; dan (ii) sama ada mahkamah, dengan mengambil kira prinsip yang dibentuk dalam keputusan *Superintendent of Lands and Surveys (4th Div) & Anor v. Hamit Matusin & Ors* ('kes *Superintendent*'), dan dengan menerima keterangan berdasarkan isu yang tidak diplidkan, berhak untuk menolak keterangan tersebut berpandukan fakta bahawa ia tidak diplidkan.

Diputuskan (menolak rayuan dengan kos; menolak untuk menjawab soalan yang dikemukakan)

Oleh Jeffrey Tan HMP menyampaikan penghakiman mahkamah:

- (1) Hakim bicara telah dengan jelas mengguna pakai kes *Superintendent* dan menerima masuk keterangan 'pinjaman', tetapi telah memutuskan bahawa ia adalah suatu fikiran terkemudian yang gagal dibuktikan atas imbalan kebarangkalian. Adalah tidak benar bahawa keterangan 'pinjaman' telah ditolak oleh hakim bicara atas alasan bahawa ia tidak diplidkan. 'Pinjaman' telah ditolak oleh hakim bicara dengan merujuk kepada fakta bahawa ia tidak boleh dipercayai. Soalan untuk kebenaran 2 dibuat berdasarkan salah faham dapatan hakim bicara. Oleh kerana gravamen fakta tidak wujud, adalah sia-sia untuk menjawab soalan untuk kebenaran 2. A
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- (2) Keterangan 'pinjaman' hanya dikemukakan apabila perayu memberi dan membaca kenyataan saksinya semasa perbicaraan. Peluang terawal untuk responden membantah adalah di peringkat pemeriksaan balas ke atas perayu. Akan tetapi, walaupun sebelum keterangan 'pinjaman' boleh dikemukakan, adalah dipersetujui antara pihak-pihak, dengan persetujuan hakim bicara, bahawa isu pembelaan yang tidak diplidkan akan dibangkitkan di peringkat penghujahan pada penutupan keseluruhan kes. Oleh demikian, adalah tidak wajar untuk mempersalahkan responden untuk membangkitkan bantahan hanya pada peringkat tersebut. F
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- (3) Fakta kes ini adalah berbeza daripada kes *Superintendent*, dan adalah tidak sesuai untuk mengguna pakai prinsip kes tersebut di mana "pembelaan yang dikatakan bukanlah penyimpangan radikal dari apa yang diplidkan dan hanya semata-mata suatu perkembangan". Berdasarkan fakta kes ini, 'pinjaman' bukanlah satu pengubahan, pindaan atau perkembangan tetapi penyimpangan radikal daripada kes yang diplidkan. Sebarang penyimpangan radikal daripada kes yang diplidkan harus diplidkan untuk mengelakkan kejutan semasa perbicaraan. Oleh itu, 'pinjaman' yang tidak diplidkan dan yang menyimpang secara radikal daripada pembelaan yang diplidkan, tidak sepatutnya dibenarkan H
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- A untuk dibuktikan semasa perbicaraan. Adalah tidak wajar untuk menggunakan pakai kes *Superintendent* hanya kerana keterangan telah dikemukakan tanpa bantahan.
- (4) Fakta juga tidak sesuai untuk soalan untuk kebenaran 1. Tiada dapatan oleh mahkamah di bawah bahawa responden yang telah menandatangani RM8 juta ke dalam akaun Cempaka dengan cara pinjaman. Sebaliknya, adalah dapatan hakim bicara bahawa ia adalah satu margin perdagangan. Hakim bicara telah memberikan alasan-alasan untuk dapatannya, yang berdasarkan keterangan kukuh, dan dapatan tersebut tidak harus diganggu oleh mahkamah rayuan. 'Pinjaman' dengan jelas adalah satu fikiran terkemudian. Oleh itu, soalan untuk kebenaran 1 tidak boleh dijawab.
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Case(s) referred to:

- Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283 FC (*refd*)
- D *Hirachand Punamchand v. Temple* [1911] 2 KB 330
KEP Mohamed Ali v. KEP Mohamed Ismail [1980] 1 LNS 169 FC (*refd*)
Lim Kar Bee v. Duofortis Properties (M) Sdn Bhd [1992] 3 CLJ 1667; [1992] 1 CLJ (Rep) 173 SC (*refd*)
Malayan Banking Bhd v. PK Rajamani [1994] 2 CLJ 25 SC (*refd*)
- E *Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah* [2015] 8 CLJ 212 FC (*refd*)
OCBC Ltd v. Philip Wee Kee Puan [1984] 2 CLJ 4; [1984] 1 CLJ (Rep) 25 PC (*refd*)
State Government of Perak v. Muniandy [1985] 1 LNS 117 SC (*refd*)
Superintendent of Lands and Surveys (4th Div) & Anor v. Hamit Matusin & Ors [1994] 3 MLJ 185 (*dist*)
- F *Woo Yew Chee v. Yong Yong Hoo* [1978] 1 LNS 240 FC (*refd*)

Legislation referred to:

- Courts of Judicature Act 1964, s. 78
Evidence Act 1950, s. 91
Rules of Court 2012, O. 35A
Rules of the High Court 1980, O. 18 r. 7(1)
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Other source(s) referred to:

- Jeffrey Pinsler, *Civil Practice in Singapore and Malaysia*, Vol 1, para 627
For the appellant - Gopal Sri Ram; M/s Shahrizat Rashid & Lee
For the respondent - R Vinayaga; M/s Skrine
- H *Reported by Sandra Gabriel*

JUDGMENT

Jeffrey Tan FCJ:

- I [1] Leave was granted to the appellant/defendant to appeal against the concurrent findings of the courts below on the following questions of law:

1. Whether as a matter of law, the elements of a loan exist where at the request of a person, payment of money is made by the payer to a third party, having regard to the decision of the English Court of Appeal in *Hirachand Punamchand v. Temple* [1911] 2 KB 330. A
2. Whether a court, having regard to the principle established by the decision in *Superintendent of Lands and Surveys (4th Div) & Anor v. Hamit bin Matusin & Ors* [1994] 3 MLJ 185, having admitted evidence on an unpleaded point is entitled to reject that evidence by reference to the fact that it was not pleaded. B

[2] The background facts could be summarised as follows. On 4 September 1997, the respondent/plaintiff, a stock broking firm, issued an offer to the appellant to open a share trading account. The appellant accepted that offer and executed an undated individual account application form and an undated margin facility agreement (MFA). Thereafter, the respondent granted a margin trading facility (MTF) of up to a limit of RM10m to the appellant to enable the appellant to trade on securities listed on the Kuala Lumpur Stock Exchange. For the purpose of his share trading transactions, the appellant maintained a Margin Account No HA600/DLH. C D

[3] By its statement of claim dated 28 November 2007, the respondent claimed from the appellant the sum of RM12,658,779, it being alleged contra losses on share transactions as at 18 April 2005, and interest on the sum of RM5,997,788.53 at the rate of 13.5% per annum calculated on a daily basis from 19 April 2005. In his statement of defence, the appellant denied that he executed the said MFA, that he was granted the said MTF, or that he traded in share transactions under the said margin account. Alternatively, the appellant pleaded that he instructed the respondent to dispose of 15,939,000 shares in Wembley Industries Holding Berhad that he had pledged to the respondent in 1998, which, if disposed, it was averred, would have been sufficient to cover any alleged debt. Limitation was also raised as a defence, but both the High Court and Court of Appeal held, in the application of the appellant to strike out the claim and in the appeal therefrom, that the action was not time barred. E F G

[4] Hence, when trial commenced, the pleaded defence consisted of a denial of the margin account and share transactions, and an assertion that the pledged shares, if disposed, would have been sufficient to settle the margin losses. But an unpleaded defence, one which changed the character of the pleaded defence, was raised by the appellant during the trial. The unpleaded defence was first raised by learned counsel for the appellant during his cross-examination of PW1. After an exhaustive examination on all conceivable matters that could have had to do with the margin account (see 167-211AR), learned counsel for the appellant suggested to PW1, who disagreed, "that Dato' Hamzah had deposited 15m Wembley shares with instructions to Omega to sell the shares at the very onset to repay the loan [of RM8m] and return the surplus to him." H I

A [5] The transcript is not clear as to when learned counsel for the respondent first challenged the suggestion that it was a loan and not margin trading. But at 219AR, that is, during the re-examination of PW1, there ensued the following exchange between learned trial judge and counsel.

B Judge: Why you didn't stand up and stop him at that time? You didn't object.

C PC: Yes. I didn't want to really object at the onset. By looking at it, it really got not so much of damage and even if My Lord feels that I should have object[ed] to it, I couldn't be jumping up and down. For instance, money lending was not pleaded, loan was not pleaded, whether the transaction was a sham was not pleaded. They never challenged the account, so they were just asking questions. I didn't want to interrupt them.

DC: I think I can deal with that in the submission.

D PC: Yes, we didn't want to interrupt too much on the procedures.

Judge: Yes.

E [6] Therefore, between the parties, it was agreed, with the concurrence of the learned trial judge, to put whatever objection to any unpleaded defence on the back burner, to be taken up only at the stage of submissions at the close of the entire case. But even so, learned counsel for the respondent perspicaciously elicited an answer from PW1 that it was not a money lending transaction (see p. 223 of the appeal record). PW2 was not cross-examined on the alleged loan. Meantime, in his witness statement (335-343AR), the appellant had affirmed that he applied to the respondent for a loan of RM7 - 8m, that he deposited 15.9m Wembley shares with the respondent, that a sum of RM8m was deposited into his account (the appellant would later testify that it was actually deposited into the account of Cempaka Holdings Sdn Bhd (Cempaka), where he was a director and shareholder), and that the respondent would sell those shares to settle the loan and refund any surplus to him. The appellant denied all knowledge of his execution of the MFA, MTF or other documents produced by the respondent. The appellant also denied receipt of the monthly statements of accounts from the respondent. Under examination-in-chief, the appellant reaffirmed that it was a loan and not margin trading. Under cross-examination, the appellant agreed that 'loan' was not pleaded in his defence (see 273AR). At the close of the entire case, the learned trial judge directed parties to file written submissions.

I [7] In his written submission to the learned trial judge, learned counsel for the respondent submitted, with respect to the alleged loan, as follows. 'Loan' was not pleaded in the defence. No application was made to amend the defence. 'Loan' was not averred to in the application to strike out the claim. The appellant contended that the loan sum of RM8m was disbursed to the

account of Cempaka. “No evidence was produced to prove that RM8m was indeed transferred into the account. When he was questioned about whether or not the auditors of Cempaka queried him as to how the RM8m allegedly came into the account, DW1 merely said that he cannot recall as it was such a long time ago ... Even if RM8m was indeed deposited after the defendant had pledged shares to the plaintiff, it does not prove that ... there was a loan. The shares were pledged for the margin facility that the plaintiff granted to the defendant.” The appellant did not mention ‘loan’ when he met the respondent’s liquidators. ‘Loan’ was not raised in the appellant’s solicitors’ first letter to the respondent. ‘Loan’ was an afterthought. ‘Loan’ was not raised in the defence or in the issues to be tried. Parties are bound by their pleadings (*State Government of Perak v. Muniandy* [1985] 1 LNS 117; [1986] 1 MLJ 490 was cited). If the appellant wanted a loan, he could have approached a bank. Section 91 of the Evidence Act 1950 excludes oral evidence which varies or adds to the terms of a written contract. No document was produced to prove that it was the respondent who deposited RM8m into the account of Cempaka.

[8] In response, learned counsel for the appellant submitted to the learned trial judge as follows. Based on *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283, where it was held by the Federal Court that it is the duty of the court to consider the evidence let in without objection on the unpleaded case of estoppel, it was too late for the respondent to object to the issue of ‘loan’. Objection to ‘loan’ should be made at the first opportunity. In *Lim Kar Bee v. Duofortis Properties (M) Sdn Bhd* [1992] 3 CLJ 1667; [1992] 1 CLJ (Rep) 173; [1992] 2 MLJ 281, it was held by the former Supreme Court that the court can take judicial notice of illegality where facts which have not been pleaded emerge in evidence.

[9] Before us, it was orally submitted by learned counsel for the appellant that evidence of ‘loan’ was admitted but then was rejected by the learned trial judge, and that the only rationale for the payment of RM8m into the account of Cempaka was loan against shares, and that the substance of the transaction was overlooked by the learned trial judge. Learned counsel for the appellant cited *KEP Mohamed Ali v. KEP Mohamed Ismail* [1980] 1 LNS 169; [1981] 2 MLJ 10, *OCBC Ltd v. Philip Wee Kee Puan* [1984] 2 CLJ 4; [1984] 1 CLJ (Rep) 25; [1984] 2 MLJ 1 and *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283; [1995] 3 MLJ 331 to support the argument that evidence of ‘loan’, since recorded, should have been considered, and *Woo Yew Chee v. Yong Yong Hoo* [1978] 1 LNS 240; [1979] 1 MLJ 131 and *Malayan Banking Bhd v. PK Rajamani* [1994] 2 CLJ 25; [1994] 1 MLJ 405 to amplify that courts should look at the substance and not the label attached to the transaction. In his written submission, learned counsel for the appellant, submitted “it is submitted here that as

A payment by a third party to a lender is considered good payment, payment by a lender to a third party at the request of the borrower must also be considered good payment. The appellant relies on *Hirachand Punamchand and Ors v. Temple*".

B [10] Learned counsel for the respondent orally submitted that in order to succeed the appellant must persuade this court to overturn the findings of the courts below, that there was no evidence that the respondent credited RM8m into the account of Cempaka or that Cempaka paid that sum to the appellant in order to substantiate the fact of 'loan', and that the share transactions were documented in 429-444AR.

C [11] Leave question 2 suggested, as if it were fact, that the learned trial judge (i) did not follow *Superintendent of Lands and Surveys (4th Div) & Anor v. Hamit bin Matusin & Ors*, and (ii) admitted evidence on an unpleaded point but then rejected that evidence "by reference to the fact that it was not pleaded". But with respect, the learned trial judge had done nothing of that sort. In fact, the learned trial judge plainly applied *Superintendent of Lands and Surveys (4th Div) & Anor v. Hamit bin Matusin & Ors* (see para. 6.2.1(iv) of the grounds of the learned trial judge) and admitted the evidence of the 'loan' (see para. 6.2.1(v) of the grounds of the learned trial judge). But the learned trial judge held that 'loan' was an afterthought (see para. 6.2.1(v) of the grounds of the learned trial judge) which was not proved on a balance of probabilities (see para. 6.2.1(vii) of the grounds of the learned trial judge), and, that it was no 'loan' (see para. 6.2.1(viii) of the grounds of the learned trial judge). 22 reasons and five sub-reasons were given by the learned trial judge for his finding that it was not 'loan' (see 78-92AR). And being 'not pleaded' was not one of those reasons. It was absolutely untrue that evidence of 'loan' was rejected by the learned trial judge on the ground that it was not pleaded. The facts asserted in leave question two could not be further from the truth.

F [12] The irony of it all is that the learned trial judge should not have applied *Superintendent of Lands and Surveys (4th Div) & Anor v. Hamit bin Matusin & Ors*. In the latter case, in the final submission after the conclusion of all the evidence, an objection was raised for the first time by the plaintiffs that certain defences were not pleaded and ought to be disregarded under O. 18 r. 7(1) of the Rules of the High Court 1980. The former Supreme Court per Peh Swee Chin SCJ, later FCJ, delivering the judgment of the court, said:

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H Generally, in civil cases only, both parties can validate any mode of adducing evidence by consent, express or inferred, even when such mode is irregular, for any irregularity is deemed to be waived by such consent. Technical rules of evidence can be to a limited extent, even dispensed with by a court without such consent, please see *Baerlein v. Chartered Mercantile Bank* [1895] 2 Ch 488; similarly with technical rules of procedure.
I Therefore, when such evidence represents a departure from pleadings, it should be objected to as when and where it is adduced, and it will be too late when it only objected to later on, as in the final submission at the close of evidence in the instant appeal. In these circumstances, the party

facing such evidence at variance from the pleadings, by failing to object, cannot be said to be taken by surprise, prejudiced, misled or embarrassed. Otherwise, the other side of the coin would be, in the event of such an objection raised at the stage of final submission being accepted by the court, that the party adducing such evidence may face the great risk of being denied leave to amend his pleadings in question at that stage.

[13] The former Supreme Court decreed that “it should be objected to as when and where it is adduced.” But in the instant case, the respondent gave notice that it would object to the defence of ‘loan’ even before any evidence of ‘loan’ was adduced in court. In his witness statement, the appellant asserted that it was a ‘loan’. But that witness statement must be first tendered and read at the hearing before it would become evidence-in-chief (O. 35A of the Rules of Court 2012). Evidence of ‘loan’ was only adduced when the appellant tendered and read his witness statement at the hearing. The earliest opportunity for the respondent to object was at the stage of cross-examination of the appellant. But even before evidence of ‘loan’ could be adduced, it was agreed between the parties, with the concurrence of the learned trial judge, to only raise whatever issue on the unpleaded defence at the stage of submissions at the close of the entire case. Given so, it was not right to fault the respondent for raising the objection at the stage of submissions at the close of the entire case. And given further that the instant facts were so different, it was just not apposite to apply *Superintendent of Lands and Surveys (4th Div) & Anor v. Hamit bin Matusin & Ors*, where “the alleged defences were not a radical departure from what had been pleaded and was a mere development of it” (see *Singapore Civil Procedure* 2015 Vol. 1 at 18 July 2012).

[14] It was also not proper to apply *Superintendent of Lands and Surveys (4th Div) & Anor v. Hamit bin Matusin & Ors* just because of the fact that the evidence was adduced without objection. For there is an important exception to the rule that evidence though not pleaded but if not objected to is admissible. At pp. 190-191 of the report, that is immediately after the above quoted passage, the former Supreme Court in *Superintendent of Lands and Surveys (4th Div) & Anor v. Hamit bin Matusin & Ors* instructed:

Such evidence, when given without any objection by the opposing party, will further have the effect of curing the absence of such plea in the relevant pleading, in other words, the effect of overcoming such defect in such pleading. As was stated by the Federal Court in *Ang Koon Kau & Anor v. Lau Piang Ngong* [1984] 2 MLJ 277 at p 278: ‘Evidence given at the trial can therefore in appropriate circumstances overcome defects in the pleadings where the net result of such evidence is to prevent the other side from being taken by surprise’. There is, however, at least one important exception to such curing of defect of pleading by evidence departing from such pleading without objection then and there to such evidence.

The exception is when such evidence represents a radical departure from the pleadings, and is not just a variation, modification or development of what has been alleged in the pleading in question, please see *Waghorn v.*

- A *George Wimpey & Co Ltd* [1970] 1 All ER 474; [1969] 1 WLR 1764, which gave rise to the proposition, which was approved by *Ang Koon Kau & Anor v. Lau Piang Ngong* 1994 3 MLJ 185 at 191 and *John G Stein & Co Ltd v O'Hanlon* [1965] AC 890; [1965] 1 All ER 547; [1965] 2 WLR 496.
- B Therefore, a court inevitably ought to enquire, when there is failure to object to such evidence when it is adduced, whether it is such a radical departure, if not, it is a mere variation, modification or a development, then the impropriety of admission of such evidence at variance with the pleadings is deemed to be waived and the defect in such pleadings cured.
- C [15] 'Loan' was not a variation, modification or development but a radical departure from the pleaded case. Hence, *Superintendent of Lands and Surveys (4th Div) & Anor v. Hamit bin Matusin & Ors* could not apply. "If the contract does not appear to be illegal on its face evidence of circumstances showing that it an illegal object will not be admitted unless those circumstances are pleaded" (*Civil Practice in Singapore and Malaysia*, volume 1 by Jeffrey Pinsler at [627]). A court may act on *ex facie* illegality in the absence of a plea (see *Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah* [2015] 8 CLJ 212). But other than *ex facie* illegality, any radical departure from the pleaded case must be pleaded, to avoid surprise at the trial. Illegality on the face of it was not made out. Therefore, 'loan', which was not pleaded and which was a radical departure from the pleaded defence, should not have been allowed to be proved at the trial (see *Singapore Civil Procedure 2015*, Vol. 1 at 18 August 2002).
- F [16] Be that as it may and in any event, evidence of 'loan' was not rejected by the learned trial judge "by reference to the fact that it was not pleaded". 'Loan' was rejected by reference to the fact that it was not credible. Leave question 2 was premised on a misconception of the findings of the learned trial judge. Since the factual *gravamen* was absent, it would be wholly idle to answer leave question 2, for whatever answer could not produce a result that could decide it for the appellant.
- G [17] The facts were also not there for leave question 1 to be posed. The facts asserted in leave question 1 read "where at the request of a person, payment is made by the payor to a third party ...". Quite plainly, those asserted facts assumed as a given that it was the respondent who deposited the said RM8m into the account of Cempaka. But there was no finding by the courts below that it was the respondent who deposited RM8m into the account of Cempaka. Rather, the finding of the learned trial judge was that "there is no evidence to show that the sum of RM7,953,750 was in fact credited into the account of (Cempaka) by the (appellant) by way of a loan" (see para. 6.2.1(vii)(e) of the grounds of the learned trial judge). Even the appellant admitted at 301-302AR that he had no evidence that it was the respondent who deposited that sum into the account of Cempaka. The finding of the learned trial judge was that it was margin trading and not loan. As said, the learned trial judge gave umpteen reasons for those findings. And those findings, which were based on solid evidence, namely individual account
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application, margin facility agreement, contra notes, contra statements, monthly statements, margin financing reports, client's history transactions, and, summary of share transactions (see 422-453AR), should not be lightly disturbed by an appellate court. The appellant contended that margin trading was a sham. But 'loan' was not raised by the appellant in his correspondence, in his defence, in his application to strike out the claim, or by him at any one occasion before trial. We wholly agree with the courts below that 'loan' was clearly an afterthought. The pay-in slip mustered by the appellant was evidence of some deposit into the account of Cempaka. But that pay-in slip was not evidence that it was the respondent who paid that sum into the account of Cempaka. The only evidence that was certain was that it was margin trading. Given that we agree with the finding of margin trading and that it was not a loan, we could not answer leave question 1.

[18] In the premises of the aforesaid, we, the remaining judges (see s. 78 of the Courts of Judicature Act 1964), following the resignation of Mohamed Apandi Ali FCJ, as he then was, now AG, unanimously dismiss this appeal with costs.

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